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IN THE

Supreme Court of the United States

October Term, 1959

No. 597

JOSE MONTALVO, WILLIAM ROVIRA and ROSE ROVIRA,

Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case.

Opinion Below

There was no opinion in the District Court. The opinion in the Court of Appeals has not yet been officially reported. It is printed as Appendix A, *infra*, on pages 20-29.

Statement of Jurisdiction

The Court of Appeals herein affirmed the conviction of the petitioners by judgment dated November 16, 1959.

Petitioners duly filed for rehearing, which was denied by order dated December 2, 1959. This petition is filed within thirty days thereafter.

The jurisdiction of this court is invoked under Section 1254 of Title 28, United States Code, and Rule 37(c) of the Rules of Criminal Procedure.

Questions Presented

1. Where the precise location of a door key probative of a defendant's access to a basement in which narcotics were secreted was part of a confession coerced by federal agents, was testimony properly received against the defendant and his co-defendants of the finding of the said key by the federal agents?

2. Where alternative possibilities are not excluded, may narcotics found by federal agents in the basement of an apartment house be received in evidence against a defendant who resides in the apartment house as a tenant, and his alleged co-principals, where none of them rented the basement or had any possessory rights therein?

3. Where search of a defendant, following his arrest, discloses that he had on his person a penknife, in the well of which traces of heroin were found, may such penknife and testimony respecting the traces of heroin be received in evidence against the defendant in whose possession the object was found, although it is acknowledged that the penknife with the traces of heroin were unconnnected with the crimes charged in the indictment?

4. Where a defendant has no knowledge of whether federal agents have probable cause for search and seizure,

or when they acquired information sufficing as probable cause, may the trial court reject the defendant's application for suppression of evidence seized on the ground that it was untimely, without deciding the merits? Should three persons be committed to Federal jails for periods up to twelve years because their attorneys failed to make the proper motions to protect vital civil rights?

5. In instructing the jury with reference to the statutory presumption in Section 174 of Title 21 (explanation of possession of narcotics), may the trial court omit advising the jury that the presumption requiring explanation by the defendant applies only where the defendant had knowledge of the fact that what he possessed was narcotics?

6. Is the standard of proof sufficient for conviction in a criminal case no higher than that required to support an award in a civil case?

7. Did the trial court err in instructing the jury that false exculpatory statements may be considered as independent evidence of guilt?

Constitutional Provisions and Statutes Involved

The text of these are printed in Appendix B, pages 30-32, *infra*.

They are U. S. Constitution Amendments 4 and 5; Sections 173, 174, Title 21, U. S. Code Section 7607 of Title 26 U. S. Code, Rule 41(e) and Rules 52(b) of the Rules of Criminal Procedure.

Statement of the Case

Count one of the two count indictment charged a violation of Sections 173 and 174, Title 21, U. S. Code in that the defendants possessed, concealed, and facilitated the transportation of approximately 13 ounces and 27 grains of heroin, on or about September 19, 1958 (5a).[1]

Count two of the indictment charged that the defendants conspired to violate the aforesaid statute (5a, 6a).

A federal agents of the Bureau of Narcotics testified that at about 6 p.m. he observed petitioners William Rovira and Montalvo leave 46 West 83rd Street, Manhattan, New York City together (10a) and walk to and enter the Del Rio garage at 157 West 83rd Street (11a). They had no articles in their hands and did not appear to be carrying anything (11a). At about 6:15, William Rovira drove out of the garage in a 1952 blue Dodge (11a). Rose Rovira was seated beside him and Jose Montalvo was in the rear seat (11a).

Rovira's car was driven to a housing project and parked there (12a). Petitioner Rose Rovira was observed walking toward a building in the housing project (12a) carrying nothing in her hand. She was next observed walking back to the car with a brown paper bag (62a). A federal agent purporting to be a taxi cab driver and to be operating a taxi cab (13a) followed the petitioner's car as it drove away from the housing project, occupied by the three petitioners

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(1) Reference are to pages in petitioner's Appendix in the Court of Appeals, where "a" follows the numeral. Appendix A to this petition, consists of the Opinion of the Court of Appeals. Appendix B to this petition, consists of constitutional provisions and statutes involved. The judgment of the Court of Appeals is Appendix "C".

(13a). Petitioner William Rovira signaled the federal agent to stop (13a) and the agent then saw Mrs. Rovira hold up and hand a brown paper bag to her husband; who handed it to petitioner Montalvo, who got out of the car (13a) and entered the narcotic agent's taxi cab, instructing him to take him to 11 West 73rd Street (13a, 14a).

Other agents observed Montalvo leave the taxi cab at West 73rd Street with a paper bag in hand, enter the building at 11 West 73rd Street and then walk out of the building minutes later, at about 8:15 P.M. (16a), without the bag (64a, 65a). It was then, as Montalvo was walking west on the street that he was arrested by federal agents (65a).

The Court, early in the trial, had held a hearing on the application of petitioner Montalvo to suppress purported confessions on the ground that he had been beaten into making them. The Court ruled the confessions to have been involuntary and suppressed them (35a).

Moreover, the Government had conceded that the confessions were post-conspiratorial and not admissible against the Roviras (20a), and the Court so ruled (20a, 22a). However, the Court stated he would admit into evidence (36a, 52a, 53a) testimony regarding the finding of the key to the back door of Montalvo's apartment by the agents (24a). This occurred two hours and a quarter after taking Montalvo back into his apartment (24a) and after Montalvo, having been beaten into confessing (33a), told the agents exactly where the key could be found in the bathroom (25a). The agents had been unable to find the key in their search prior to the coerced divulgence by Montalvo (24a).

One of the agents who arrested Montalvo and took him back to his apartment testified that he found a brown paper

bag containing heroin (Gov't. Ex. 1) (105a, 106a) in the basement of the building (67a, 68a). This agent also testified that he found the key to the back door of the apartment in a roll of toilet paper in the bathroom (69a), precisely where Montalvo in the course of his coerced confession had told the agents it was to be found (25a). The back door stairs are metal fireway stairs that lead to every floor in the building (67a).

He returned to the basement through the back door and in the basement found a sleeve of a shirt (Govt. Ex. 19) in the back of the closet in which he had already found the bag (69a). The bag was in the outer part of the closet (67a). The sleeve was in the back of the closet completely out of view (69a).

There were small boxes of mannite an adulterant for heroin in the sleeve (69a), also empty glassine envelopes, two envelopes of heroin and a small stapler (70a).

The petitioners' motion to suppress the contraband seizure in the basement closet of the building where Montalvo was a tenant was denied solely on the ground that it was untimely despite Montalvo's counsel's explanation that he had been ignorant of the facts (32a). The Court stated that the Roviras were bound by Montalvo's lack of timeliness (46a, 47a).

The point that the seizure was not incident to a valid arrest (26a, 27a), in that there existed no probable cause for the arrest (26a, 27a) and was otherwise invalid, was not decided.

The motion to suppress was broad enough to include the search for and the seizure of the key to Montalvo's back door (27a).

At about 11:15 P.M. William Rovira's Dodge was observed with Rovira and an "informer" proceeding west on 73rd Street, pause in front of the building, continue west on 73rd Street (54a) and a few minutes later return and again pause in front of the building and then again continue west (54a).

At about 11:30 P.M. the agent who had found the narcotics in the basement and the key, arrested William Rovira in a drug store in the vicinity (71a). With Rovira in the drug store, was the "informer" who had been in the agent's office at 1:30 in the afternoon of that day (72a, 73a). William Rovira was taken to Montalvo's apartment (81a). At about midnight, agents accompanied William Rovira to his home (72a). Mrs. Rovira opened the door. T. J. Dugan told her that he and the others were Federal Narcotic Agents and that her husband was in custody (72a). She consented to have the apartment searched, which the agents did (72a). In response to questioning she said she had gone to the Bronx with her husband and had picked up a friend of her husband whom she did not know, on the way (72a).

Upon searching William Rovira following his arrest, the agents found a penknife on his person which contained a trace of heroin (one two-hundreths of a grain) (108a).

In the absence of the jury, a hearing was held on the issue of the validity of the arrest. The agent who had arrested Rovira was called by the petitioners (94a) and he stated that he had information that the Roviras were going to the Bronx to pick up heroin and bring it to the apartment at 11 West 73rd Street, and there cut it up, that the cutting would probably be done in the basement of the building at 11 West 73rd Street (95a).

The penknife and the trace of heroin was admitted in evidence against petitioner William Rovira, upon the insistence of the Government although the trial court was reluctant to do so (92a).

ARGUMENT

I.

(Question presented 1)

Referring to the vital question as to admissibility against the petitioners of the testimony of the federal agent on the subject of his finding of the key to the fire door, the Court of Appeals in its opinion (pp. 26, 27, *infra*) purports to epitomize the petitioners' contentions and the Government's contentions and then disposes of the subject by stating that Montalvo's trial counsel objected only to the admission of the key and that counsel acquiesced in the agents being allowed to testify to the discovery of the key.

However, the problem is not susceptible of such summary disposition. The petitioners' Appendix on page 68a discloses most particularized objection to testimony of the finding of the key. Referring to page 646 of the transcript, the text of the petitioners' Appendix quotes Montalvo's attorneys as follows: ". . . even the finding of the key would be inadmissible for the reason that it would be part of the so-called confession".(2)

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(2) It is highly anomalous for the Court of Appeals of the Second Circuit to contra-distinguish the finding of the key and the key itself as evidentiary entities, in view of the long-standing and repeated holdings by the Court that the physical production and presence of an incriminating object in the court was not necessary and that the federal agents' testimony sufficed as proof (*U. S. v. Adelman*, 2d Cir., 107 F. 2d 497, 498; *U. S. v. Tramaglino*, 197 F. 2d 928, 933; *U. S. v. Brecher*, 242 F. 2d 642, 644).

Moreover, the Court of Appeals erred in its summary of the petitioners' contentions. According to the Opinion of the Court of Appeals the appellants contended that the finding of the key must be excluded as "fruit of the poisoned tree" (p. 27, *infra*).[3]

Actually, the contention of the petitioners, if it is to be converted into a figure of speech, perceives the finding of the key not as mere "fruit of the poisoned tree" but as part of the trunk and roots of the tree itself—the tree of due process of law.

A conviction obtained by means of a coerced confession deprives a petitioner of liberty without due process of law (e.g. *Brown* v. *Mississippi*, 297 U. S. 278, 285; *Chambers* v. *Florida*, 309 U. S. 227, 228). Coerced confessions are, of course, inadmissible in federal courts (e.g. *Anderson* v. *United States*, 318 U. S. 350).

Indeed, in view of the Supreme Court's broad power of supervision over the procedure and practices of federal courts, it has been held unnecessary to invoke constitutional provisions in support of this exclusory rule (e.g. *McNabb* v. *United States*, 318 U. S. 332, 341, 345). A judgment of conviction based even in part upon a coerced confession cannot stand (e.g. *Lee* v. *Mississippi*, 332 U. S. 742, 745).

Indeed, the improper admission in evidence of a confession against a co-defendant at a criminal trial in a federal court was held to require a reversal as to all defendants (*Anderson* v. *United States*, 318 U. S. 350, 356, *supra*; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 155).

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(3) The figure of speech is more accurately rendered as "fruit of the poisonous tree" (*Nardone* v. *United States*, 308 U. S. 338, 341).

It is clear from the foregoing that the testimony as to the finding of the key in the very spot where the petitioner Montalvo told the agent it was to be found in his coerced confession is not admissible in a criminal trial in the federal courts and that its admission represented a denial of due process of law.

In any event, the question is not one of a figure of speech, but of fundamental rights and this court's view of the applicability of those rights herein.

The Government's contention that the "fruit of the poisoned tree" doctrine does not apply to confessions (as noted in the opinion of the Court of Appeals 41[illegible] 27, *infra*) cites 3 Wigmore on Evidence, Third Edition, Section 859. Implicit in the Government's contention appears to be the theory, completely discredited and rejected in the federal courts, that the basis for the rule that a coerced confession is inadmissible is the fact that the very coercion renders it unreliable. (See 3 Wigmore, Section 856, page 337.)

The Government's contention is disposed of by the following quotation from this court's decision in *Rochin v. California*, 342 U. S. 165, 172, 173 in which the court wrote:

> "It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, *however much verified*, obtained by coercion." (Emphasis supplied.)

The case of *United States* v. *Bayer*, 331 U. S. 532, 540-41 cited by the Government, is acknowledged in the Court of

Appeals' Opinion (p. 27, *infra*) to be not "at all conclusive". In the Bayer case, this Court simply held that a confession which was uncoerced would not be rendered inadmissible in evidence, by the mere fact that six months earlier the defendant therein had made a coerced confession.

The Opinion of Judge Learned Hand, in *United States* v. *Nardone*, 106 F. 2d 41, 44 deals with the subject of evidence only indirectly obtained as a result of unlawful wire taps and thus has no application to our case. Moreover, as this Court noted on appeal in the aforesaid Nardone case, only if knowledge of facts improperly obtained are later gained from an independent source may they be proved (308 U. S. 338, 341).

This Court wrote: at page 340 of 308 U. S.:

> "To forbid the direct use of methods thus characterized but to put no curb on their full *indirect* use would only invite the very methods deemed "inconsistent with ethical standards and destructive of personal liberty." (Emphasis supplied)

We have already noted that the agents herein were unable to find the key in the course of their search of the Montalvo apartment and located it only when Montalvo was coerced into telling them where the key was, in the course of his coerced confession. Certainly, the testimony of the finding of the key constituted, indirect use of the coerced confession, a practice discountenanced in *Nardone* v. *United States*, 308 U. S. 338, 340, *supra*.

The Government emphasized the evidence regarding the rear door key in the summation to the jury (transcript 1179).

II.

(Questions presented 2 and 6)

In response to our urging in the Court of Appeals that the petitioners' objection (74a, 77a, 114a, 120a, 121a) to the admission in evidence against them of the brown paper bag and the sleeve found in the basement, should have been upheld by the trial court, on the ground that there are literally millions of similar brown paper bags in New York City and that access to the basement might be had not only by several other tenants (86a), or visitors of such tenants, but by total strangers, because of the condition of the back fence (87a), the Court of Appeals held that the aforesaid objects were admissible for the reason that it was not necessary to exclude all possibilities other than that Montalvo secreted the objects in the basement.(4)

The Court of Appeals cited its decision in *Burris* v. *American Chicle Co.*, 120 F. 2d 218, 222 (p. 25, *infra*). Aside from the fact that in the cited case a rope admitted into evidence was positively identified by its peculiar characteristics (page 221 of 120 F. 2d), the mere fact that an article would

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(4) There was absolutely no proof that the paper bag found in the basement had not already been there when Montalvo returned to his apartment after leaving the Government taxi cab. Nor is there any proof that the contents of the paper bag had contained any contraband when Montalvo received it, assuming it was the same bag. Even if the inference could be drawn that the paper bag found in the basement was the very bag handed to Montalvo by William Rovira, it would require the impermissible drawing of another and further inference from the original inference to reach the conclusion that the contraband was in the bag when it was handed to Montalvo. There was no evidence that any of the petitioners' fingerprints had been found on the bag in the basement or on the glassine envelopes in it (70a).

be barely admissible in a civil case, hardly qualifies it as the very keystone of the Government's case in a criminal prosecution where alternative possibilities have not been eliminated.

The Court's decision in this case is contrary, for example, to the holding of the Third Circuit in *United States v. Laffman*, 152 F. 2d 393, 394 where that Court wrote: "In order to justify a conviction of crime on circumstancial evidence, it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt". The *Laffman* case, we respectfully submit, represents the general rule (See, *Wain* v. *United States*, 5 Cir., 148 F. 2d 615; *Maryland & Virginia Milk. Prod. Ass'n*, C. A. D. C. 193 F. 2d 907; *Wesson* v. *United States*, 8 Cir., 172 F. 2d 931), and the one which should prevail.(5)

Beyond the foregoing considerations, the admission in evidence of the shirt sleeve was further barred, certainly against the Roviras, in that there was no testimony that

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(5) In the background of the Court's decision would appear to be the proposition advanced by the Second Circuit in *United States* v. *Feinberg*, 140 F. 2d 592, 594 that the standard of evidence is the same in both civil and criminal cases. This Court is respectfully requested to consider this proposition herein. It may be noted in a series of recent denaturalization cases the Supreme Court has held that for the very reason that denaturalization proceedings in their consequence approximate a criminal case rather than a civil case, that the Supreme Court itself must feel assured that the proof against the defendant therein meets the standard of being proof beyond a reasonable doubt. (*Klaprott* v. *United States*, 335 U. S. 601, 612; *Baumgartner* v. *United States*, 322 U. S. 665; *Schneiderman* v. *United States*, 320 U. S. 118, see also *United States* v. *Anastasio*, Third Circuit, 226 F. 2d 912).

See also separate opinion of the late Judge Frank in *United States* v. *Castro*, 2 Cir., 228 F. 2d 807, 808.

either of the Roviras had handed a shirt sleeve to Montalvo, and further, there was no evidence that a general continuing conspiracy existed between Montalvo and the Roviras.[6]

III.

(Question presented 3)

The Court of Appeals sustained the admission against him of the penknife found upon William Rovira's person solely on the ground that the penknife constituted a "tool" suitable to carrying forward the illegal enterprise. Apparently, the Court had reference to the dilution of heroin with innocuous powder, However, a penknife is not a "tool" where it had no special suitability for the purpose, and was no more suitable than any of an endless number of objects would be. (Compare, *Mahar* v. *Lainson*, 247 Iowa 297, 72 N. W. 2d 516, 518, 519.) Any pencil-like article, or even the fingers of the human hand could be used to mix the heroin and once it is acknowledged, as the Court of Appeals implicitly does on page 28, *infra*, that the Government was not entitled to have the penknife admitted as proof of another offense, the penknife should have been held inadmissible.

The vice of the admission of the penknife is that it violates the rule that evidence must not be called out for an apparently legal purpose and then be used for an illegal purpose (*People* v. *Zackowitz*, 254 N. Y. 192, 199).

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(6) The shirt sleeve and its contents were not found by the narcotics agent when he found the brown paper bag. The shirt sleeve was secreted completely out of view in the rear of the closet, whereas the paper bag was exposed to view (68a, 69a).

IV.

(Question presented 4)

Should persons be committed to Federal Jail for periods up to 12 years because their attorneys failed to make the proper motions in order to protect vital civil rights? The trial court, as we have noted, never decided the merits of the petitioners' application to suppress the evidence of the brown paper bag and the shirt sleeve on the ground that the seizure of these articles was the fruit of an illegal search of the premises. The trial court denied the application simply by holding that the application was untimely (32a) and that the Roviras were bound by Montalvo's lack of untimeliness (46a, 47a).

However, not until the trial itself, did the appellants learn that the Government had information from the "informer" that the Roviras would make a trip to the Bronx, obtain heroin and that it would be processed there in the evening. The Government's proof showed that the "informer" had been in at the Bureau of Narcotics at 1:30 in the afternoon (72a, 73a). Thus, there was ample time to obtain a Search Warrant for Montalvo's premises. Failure to obtain a Search Warrant was a violation of the constitutional provision (*Johnson* v. *United States*, 333 U. S. 10, 14; *United States* v. *Jeffers*, 342 U. S. 48, 51).

However, petitioners could not be charged in advance with knowledge that the Government had this opportunity to obtain the Search Warrant.

To hold that a defendant's time to challenge the constitutionality of a search and seizure starts running from the moment of search and seizure, rather than from the time

when the defendant becomes aware of circumstances bringing into question the legality of the search and seizure is to put a premium on the making by defendants of premature affidavits approaching perjury in their irresponsibility. Thus the application to suppress was timely under Rule 41(e) of the Rules of Criminal Procedure.

Of course, if the seizure was illegal against Montalvo, it was likewise illegal against the Roviras (*McDonald* v. *United States*, 335 U. S. 451, 456; *Mesarosh* v. *United States*, 352 U. S. 1, 10; *Anderson* v. *United States*, 318 U. S. 350, 356, *supra*; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 155, *supra*).

V.

(Question presented 5)

The trial court in instructing the jury with reference to the statutory presumption (Section 174 of Title 21 (explanation of possession of narcotics)), failed to advise the jury that the presumption requiring explanation by a defendant applies only where the defendant had knowledge of the fact that what he possessed was narcotics.

As stated in *United States* v. *Maghinang* on page 761 of 111 F. Supp. "In short, to constitute possession a defendant must *knowingly* have the condemned objects in his possession" (emphasis in original).

Moreover, the element of knowledge of possession of narcotics is so vital and fundamental to conviction that the jury, as a bare minimum of protection to a defendant, must be instructed that the statutory presumption (Title 21, Sec. 174) exerts its juridical leverage only if the jury finds that

the defendant knew that he possessed narcotics. In other words there is no possession of narcotics in legal contemplation if knowledge thereof is missing.

Certainly, the jury should have been told that it was for them to determine as the basis for the case against Mrs. Rovira, for example, that it was incumbent upon them first to find that Mrs. Rovira knew that there were narcotics in the paper bag which she carried out of the housing project building and into her husband's car.

Likewise, the other petitioners were entitled to instructions to the jury on the subject of knowingly possessing narcotics, particularly as the area in which the brown paper bag and shirt sleeve were discovered was not premises rented by Montalvo (*Jackson* v. *United States*, 250 F. 2d 722, 723).

Objection was not taken to this omission from the charge, but it is respectfully submitted that this court should recognize this error, both under Rule 52 (b) of the Rules of Criminal Procedure (p. 32, *infra*) and, under its supervisory powers (*McNabb* v. *United States*, 318 U. S. 332, *supra*).

VI.

(Question presented 7).

The trial court charged the jury that "false exculpatory statements" by the Roviras may be considered by the jury as possessing "independent evidence of guilt" (146a).

We respectfully submit that this charge was basically erroneous, and that the Court of Appeals erred in deeming such construction proper (p. 29, *infra*).

We respectfully submit that this court in *Opper* v. *United States*, 348 U. S. 84 in holding that an accused's exculpatory statements may not serve as the basis of conviction in consequence of their falsity, but that there must be independent evidence of guilt implicitly held, too, that false exculpatory statements are not properly to be designated as independent proof of guilt, but merely of lending whatever support may be realistically assigned to such statements, in connection with more tangible evidence (*People* v. *Leyra*, 1 N. Y. 2d 199, 209, 210; *Hickory* v. *United States*, 160 U. S. 408, 417).

CONCLUSION

The application for Writ of Certiorari should be granted.

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With him on the petition.

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 38—October Term, 1959
(Argued October 8, 1959 Decided November 16, 1959).
Docket No. 25639

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSE MONTALVO, WILLIAM ROVIRA and ROSE ROVIRA,

Appellants.

Before:

WATERMAN, MOORE and FRIENDLY,

Circuit Judges.

Appeal by defendants from judgments entered in the District Court for the Southern District of New York, Edward J. Dimock, *Judge*, after a jury trial in which defendants were found guilty under a two-count indictment for violation of 21 U. S. C. §§173 and 174 and conspiracy to violate the same sections. Affirmed.

STEPHEN E. KAUFMAN, Asst. U. S. Attorney, New York, N. Y. (S. Hazard Gillespie, Jr., U. S. Attorney, David Klingsberg, and Otis Pratt

Pearsall, Asst. U. S. Attorneys, New York, N. Y. on the brief), *for Appellee.*

Henry G. Singer, New York, N. Y. (Harry Silver, New York, N. Y. on reply brief), *for Appellants.*

Friendly, *Circuit Judge*:

This appeal is from judgments, entered after a trial before Judge Dimock and a jury, convicting defendants under a two-count indictment which charged them with receiving, possessing, concealing and facilitating the transportation and concealment of narcotics illegally imported in violation of 21 U. S. C. §§ 173 and 174 and with conspiring to violate the same sections. Appellants question the sufficiency of the evidence and allege various errors by the trial judge. We think the evidence was ample to warrant submission to the jury, and we find no errors in Judge Dimock's conduct of the trial.

The prologue to the story told at the trial occurred in the afternoon of September 19, 1958, when a special employee of the Bureau of Narcotics informed narcotic agents that William and Rose Rovira and Montalvo would meet at the Roviras' home later in the afternoon, that the three defendants would then go to the Bronx to pick up some pure heroin, and that Montalvo would carry this to his apartment for adulteration. The agents set up an extensive surveillance of the defendants with efficiency and dispatch. The results were put before the judge and the jury by a number of agents and employees of the Bureau of Narcotics

and also by Montalvo's landlady. Of the three defendants only Montalvo testified.

About 6 P. M. the three defendants left 46 West 83rd Street where the Roviras lived. They were carrying nothing with them. They went to a garage, departed in a car still carrying nothing with them, and drove to the Bronx. En route they made a stop at a butcher shop. Rose Rovira left the car empty handed and returned equally so. Their next stop was a housing project in the Bronx. Rose again alighted, carrying nothing. A few minutes later she came back, carrying a brown paper bag. As she paused on the curb, two Federal agents drove between her and the car. One of them estimated the bag to be eight inches in length and four inches in height and width; he noted also that the neck of the bag had been rolled down to serve as a handle.

Rose entered the car, which drove off. A taxicab driven by a government agent followed it. Shortly the Rovira car stopped. Rovira signalled for a taxicab; the government cab responded. The driver saw Montalvo descend from the Rovira's car, holding a brown paper bag which Rose Rovira had passed to her husband, who had handed it on. Montalvo, with the bag, then entered the government cab. The agent-taxi driver's estimate of the dimensions of the bag was nearly the same as that of the agent who had first observed it. He also noted that the neck had been rolled down to form a handle.

Montalvo gave the agent 11 West 73rd Street as the destination. The agent made a stop on the pretext that he wished to call his wife. Instead he called the Bureau of Narcotics for the deployment of additional agents. Mon-

talvo left the cab at the corner of West 73rd Street and Central Park West. The agent-taxi driver and another agent saw him enter 11 West 73rd Street, bag in hand. A narcotic clerk posted inside the building saw him enter apartment 1A, still with paper bag. Fifteen minutes later Montalvo left 11 West 73rd, without paper bag. He was confronted by two agents who inquired whence he came. Montalvo said he had just come from uptown in a cab and was on his way to meet a girl. He denied having come from 11 West 73rd Street. He was arrested, searched and brought back to the apartment. This was thoroughly searched for the brown paper bag without success. During this search Montalvo removed a lining of brown paper from a bureau drawer. He wrapped this around some shirts in an endeavor to demonstrate to the agents that this was the package he had been carrying. The endeavor failed; for the package of shirts was larger and bulkier than the paper bag, the paper was darker in color and covered with dust, and Montalvo's story that he had carried the package under his arm did not tally with the observations made by the two agents and the narcotic clerk.

While the search of the apartment was in progress, the landlady arrived. She unlocked the outer street door leading to the basement; a first search of the basement and of the rear stairway connecting it with each apartment did not disclose the paper bag. On returning to Montalvo's apartment, the landlady asked for his key to the fire door to the rear stairway leading to the basement. He said it was lost. The agent and the narcotic clerk went again to the basement via the street door, and made a more thorough search. This time they found a brown paper bag containing

heroin, hidden at the top of a closet. The agent who had seen Rose Rovira carrying a bag in the Bronx and the agent-taxi driver who had driven Montalvo confirmed that the bag found in the closet was the same in size and shape as the one they had previously observed.

The agents then obtained a confession from Montalvo by methods which led Judge Dimock to suppress it. Among the items of information yielded by the confession was that Montalvo's fire door key was concealed in a roll of toilet paper in his bathroom. Montalvo accompanied one of the agents who found this. There followed a third trip by the agents to the basement, this time by the rear stairway route, and the discovery, in the same closet where the paper bag had been hidden, of a shirtsleeve containing more heroin and paraphernalia useful for its adulteration and conversion from wholesale to retail size.

About 11:15 P. M. William Rovira drove past 11 West 73rd Street in the same car that had made the trip to and from the Bronx. With the ill fortune that dogged the defendants that evening, he had attracted as a passenger a special employee of the Bureau of Narcotics, who died before the trial. On two occasions Rovira slowed down as he passed 11 West 73rd Street, looked toward the building, but, after a few seconds, resumed speed. Shortly thereafter other agents found Rovira and the special employee in a nearby drugstore. They placed Rovira under arrest. When asked whence he had come, Rovira said he had come straight from home to the drugstore to buy medicine. When taken to the 11 West 73rd Street address and confronted with Montalvo, he said he did not know Montalvo and had never

seen him before. A search of Rovira's person disclosed a penknife. The blade of this was caked with a small quantity of heroin.

For the final act we return to the Rovira apartment at 46 West 83rd Street. Rose was apprehended there. Her account of her day's doings was that she and her husband had gone to the Bronx to visit and on the way had picked up a friend of her husband whose name she did not know. She denied knowing Montalvo. Both Roviras repeated this denial at the United States attorney's office on the following morning when all three defendants were present. At the trial Montalvo admitted being with the Roviras on September 19; he testified also that he had known them for about a year.

We think this summary is enough to dispose of defendants' contention of insufficiency of evidence to warrant submission to the jury, and we proceed to the alleged errors at the trial:

(1) *The admission in evidence of the brown paper bag containing heroin and the shirtsleeve containing heroin and narcotic paraphernalia, which were found in the basement closet at 11 West 73rd Street.* The admission of these objects is attacked on the grounds that there was insufficient evidence to connect them with the defendants and that their discovery was the result of an illegal search and seizure.

The first ground of attack requires little comment. The identity of the bag found in the basement closet in size, color, and shape with the bag that Rose carried from the Bronx apartment, that was passed from Rose to William to Montalvo in the car, and that Montalvo took into the

taxicab and from the cab into his own apartment, the absence of any such bag in the apartment, Montalvo's incredible story in regard to the brown paper in his bureau drawer, and his opportunity of access to the basement afforded a rational basis for the jury to conclude that the bag containing heroin found in the basement closet at 11 West 73rd Street was the self-same bag that had first appeared in Rose's hands in the Bronx. The fact that other persons also had access to the basement went simply to the weight of the evidence and not to its admissibility; it was not necessary to exclude all other possibilities in order to establish sufficient authentication to make the bag admissible. See *Burris* v. *American Chicle Co.*, 120 F. 2d 218, 222 (2d Cir. 1941). If the jury could thus reasonably attribute the paper bag and its contents to the defendants, they could likewise attribute the shirtsleeve containing heroin and narcotic paraphernalia which was found nearby.

The trial judge denied defendants' request to suppress the evidence as having been obtained by illegal search and seizure on the ground that motion to that end should have been made before the trial. F. R. Cr. P. 41 (e). Defendants argue that they come within the exceptions to this requirement where "opportunity therefor did not exist or the defendant was not aware of the grounds for the motion" and that in any event the trial judge should have exercised the discretion confided to him by the Rule to permit the motion to be made at the trial. In support of the former argument, they claim that it was not until the hearing late in the trial with respect to the legality of Rovira's arrest that they learned the agents had been told in the afternoon what defendants had afoot for the evening, an interval

affording opportunity to obtain a warrant to search Montalvo's apartment. However, Montalvo's trial counsel could hardly have been so naive as to suppose that all that happened to defendants on the evening of September 19 had occurred by accident. The surprise at the trial must have been to find, not that the government had so much advance notice, but that it had been able to do so much with so little. Throughout the nearly four months between arrest and trial Montalvo's trial counsel must have known that the seized narcotics would be offered. A hearing on a pretrial motion for suppression, to which Montalvo was entitled, F. R. Cr. P. 41 (e), would have enabled counsel to develop just how much advance information the government agents had. Moreover, there is much to suggest that the failure to move to suppress in advance of trial was a strategic choice. For, since the bag and the shirtsleeve had been found outside Montalvo's apartment, an unsuccessful motion to suppress would have involved a detrimental admission of ownership or possession of the narcotics—a dilemma with which this Court has declined to sympathize. *Connolly* v. *Medalie*, 58 F. 2d 629, 630 (2d Cir. 1932). Moreover, although the motion to suppress had been made and denied at an early stage of the trial, it was not renewed after defendants learned of the afternoon interview at which the agents had been alerted. Without passing on the question whether the search was in fact unlawful, we thus find no error in Judge Dimock's refusal to entertain the motion to suppress made at the trial, *United States* v. *Poller*, 251 F. 2d 333, 336 (2d Cir. 1958) and cases cited.

(2) *Admission of testimony by narcotic agent as to the finding of the key to the fire door.* Appellants contend that

the government learned the situs of the fire door key only as a result of Montalvo's coerced confession and that testimony in regard to the finding of the key must therefore be excluded as "fruit of the poisoned tree." Cf. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920) and *Nardone* v. *United States*, 308 U. S. 338 (1939). The government contends that the "poisoned tree" doctrine does not apply to confessions, citing *United States* v. *Bayer*, 331 U. S. 532, 540-41 (1947), 3 Wigmore on Evidence, 3d ed., §859, and a statement by Judge Learned Hand in this Court's opinion in *Nardone*, 106 F. 2d 41, 44 (1939). While we do not think *Bayer* at all conclusive, the question sought to be presented by appellants does not arise on this record. For careful examination of the transcript convinces us that Montalvo's trial counsel objected only to the admission of the key, which the government ultimately decided not to offer, and to testimony by the agent that Montalvo accompanied him in the search of the bathroom, which the trial judge excluded, and that, with any reference to Montalvo thus eliminated, counsel acquiesced in the agent's being allowed to testify to the discovery of the key. Having acquiesced in the trial judge's ruling, Montalvo may not challenge it on appeal, *United States* v. *Easterday*, 57 F. 2d 165 (2d Cir. 1932). Trial counsel for the other defendants likewise made no objection, and these defendants therefore may not do so now, even if they had standing. Cf. *Goldstein* v. *United States*, 316 U. S. 114, 121 (1942).

(3) *Admission against William Rovira of the penknife found on Rovira's person after his arrest.* It is claimed that admission of the penknife in evidence violated a rule

against admitting evidence of former crimes; that the penknife was found as the result of an illegal search; and, on behalf of Rose Rovira and Montalvo, that even if the knife were admissible against William Rovira, it was not admissible against them and they were not properly protected by Judge Dimock's instruction that the jury should consider this evidence only as against William.

Defendants misconceive the theory of the admissibility of the penknife. The evidence was not admitted to show that since William Rovira had committed another narcotics offense at some unspecified date, he might be supposed capable of committing another one now. The government was seeking to show that Rovira, who had been with Montalvo earlier, was about to rejoin him to carry forward the illegal enterprise. Rovira's possession of a tool whose suitability to that end was made plain by its previous use in a similar one, was relevant to that issue. The fact that evidence which is relevant and not otherwise inadmissible may also tend to show a previous crime does not bar its admissibility. 1 Wigmore on Evidence §§215-16 (3d ed. 1940). The trial judge must have wide discretion to determine whether the probative value of the evidence is outweighed by its prejudicial character. McCormick, Evidence, §157 at 332 (1954). The discretion here was not abused. For if the evidence did not have a great tendency to lead, it had equally little to mislead. Rovira was not entitled to have the penknife suppressed as obtained by illegal search and seizure. For, apart from any question as to the timeliness of this request, the search was valid as incident to a lawful arrest. 26 U. S. C. §7607 (2); *Draper* v. *United States*, 358 U. S. 307 (1959). And, even assuming in favor of Rose

Rovira and Montalvo that the penknife was not admissible against them, Judge Dimock's limiting instruction gave them whatever protection they required. *United States* v. Stromberg, 268 F. 2d 256, 269 (2d Cir. 1959).

(4) *Instructions as to exculpatory statements.* Appellants criticize the instructions of the trial court that the jury might consider defendants' false exculpatory statements "as independent evidence of guilt" and that such statements "are circumstantial evidence of a guilt consciousness and have independent probative value." They claim this left the jury with the impression that it might convict the defendants on the basis of such statements alone. We think that appellants' interpretation of the instructions is untenable and that the instructions complied with the views of this Court. *United States* v. *Smolin*, 182 F. 2d 782, 786 (1950). Moreover, no objection was taken to Judge Dimock's charge in this respect and therefore appellants cannot make one now. F. R. Cr. P., 30.

Appellants' contention that the trial judge was bound to make available the entire testimony of one of the agents before the grand jury rather than reviewing the testimony and making pertinent parts of it available, has now been foreclosed by *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395 (1959). We have reviewed such other claims as are made by appellants and find them without merit.

Judgments affirmed.

APPENDIX B

Constitutional Provisions and Statutes Involved

Amendment 4 of the United States Constitution states: "UNREASONABLE SEARCHES AND SEIZURES.—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment 5 of the United States Constitution reads in part as follows: "No person shall be * * * deprived of life, liberty, or property without due process of law;"

Section 174, Title 21 reads as follows:

> "174. Penalty-Evidence.—Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954 [26 §7237(c)]), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Section 7607 of Title 26 reads as follows:

"Additional Authority for Bureau of Narcotics and Bureau of Customs.

The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401 (1) of the Tariff Act of 1930, as amended; 19 U. S. C., sec. 1401 (1) (19 sec. 1401 (1) may—

(1) carry firearms, execute and serve search warrants, and arrest warrants, and serve subpenas and summonses issued under the authority of the United States, and

(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation. (July 18, 1956, c. 629, Title 1, sec. 104 (a) in part, 70 Stat. 570.)"

Rule 41 (e) of the Federal Rules of Criminal Procedure reads as follows:

"(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Rule 52.(b) of the Federal Rules of Criminal Procedure states: "PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

APPENDIX C

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of November one thousand nine hundred and fifty-nine.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSE MONTALVO,
ROSE ROVIRA,
WILLIAM ROVIRA,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix C—Judgment of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. Daniel Fusaro,
Clerk.

(Seal)

A true copy,

(sgn) A. Daniel Fusaro,
Clerk.